Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LARRY SABO PETITIONER

VS.

CITY OF OWENSBORO RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO KENTUCKY COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner, a classified employee of the city of Owensboro, Kentucky was deprived of his property interest in continued employment in violation of the due process clause of the Fourteenth Amendment when he was fired following the expiration of his twelve month statutory probationary period arbitrarily and without an opportunity for a hearing.

2. Whether Petitioner, if he be deemed a probationary employee of the city of Owensboro, Kentucky had a right to a due process hearing under the Fourteenth Amendment prior to the taking of his property interest in continued employment where he was dismissed approximately twenty months after first being employed.

PARTIES

The parties to the proceeding are: the city of Owensboro, Kentucky, The Board of Commissioners of the City of Owensboro and Waymond Morris, Dick Moore, (now deceased), Olive Burroughs, Bill Van Winkle and Jim Woods, each in his or her capacity as a member of the Board of Commissioners of the City of Owensboro.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals, the highest state court to review this case on its merits appears at Appendix A to this Petition and is unpublished. The Opinion of the Kentucky Court of Appeals was rendered on August 25, 2000.

The order of the Kentucky Court of Appeals denying Petitioner's Petition for Rehearing which was entered on October 19, 2000 appears at Appendix B to this Petition and is unpublished.

The August 15, 2001 order of the Kentucky Supreme Court, the highest court in the state of Kentucky, denying Petitioner's Motion for Discretionary Review appears at Appendix C to this Petition and is unpublished.

The order of the Daviess Circuit Court which granted Respondents' motion for summary judgment and dismissed Petitioner's cause of action was entered on March 5, 1999, is unpublished and appears at Appendix D of this Petition.

JURISDICTION

The date on which the Kentucky Court of Appeals, the highest state court to examine the merits of Petitioner's case rendered its decision was August 25, 2000. A copy of that decision appears at Appendix A.

A timely Petition for Rehearing was thereafter denied by the Kentucky Court of Appeals on October 19, 2000 and appears at Appendix B of this Petition.

The Supreme Court of Kentucky, Kentucky's highest court thereafter denied Petitioner's timely Motion for Discretionary Review on August 15, 2001. That order appears in Appendix C to this Petition.

An extension of time to file the petition for writ of certiorari was granted to and including January 12, 2002 on November 29, 2001 in Application No. 01A417.

The jurisdiction of this court is invoked under 28 USC 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or

any commission held or authority exercised under, the United States. (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

KRS 90.350(9)

(9) The appointing authority may provide that all appointments for initial permanent employment may be probationary appointments for a period of not more than twelve (12) months, after which probationary period regular appointments shall be given to all probationary employees who are deemed to be satisfactory by the respective appointing authority.

KRS 90.360

(1) No employee in the classified service of a city of the second or third class shall be dismissed, suspended, or reduced in grade or pay for any reason except inefficiency, misconduct, insubordination, or violation

of law involving moral turpitude, or, in a city of the third class, violation of any rule adopted by the city legislative body or civil service commission. (2) Any person may prefer charges in writing against any employee by filing them with the mayor or other appointing authority who shall communicate the charges without delay to the civil service commission of the city. The charges must be signed by the person making them and must set out clearly each charge. The appointing authority shall, whenever probable cause appears, prefer charges against any employee whom he or she believes guilty of conduct justifying his or her removal. Upon the filing of charges, the clerk of the civil service commission shall notify its members and serve a copy of the charges upon the accused employee with a statement of the date, place, and hour at which the hearing of charges will begin, this hearing not to be held within three (3) days of the date of the service of charges upon the accused

employee. The day on which the charges are served on the accused employee shall count as one (1) of the days of notice. The person accused may in writing waive the service of charges and demand trial within three (3) days after they have been filed with the clerk of the civil service commission. (3) Upon the hearing, the charges shall be considered traversed and put in issue, and the trial shall be limited to the issues presented by the written charges. (4) The civil service commission shall have the power to summon and compel attendance of witnesses at all hearings by subpoena issued by the clerk of that body and served upon the witnesses by members of the police department of the city or any officer authorized to serve subpoenas. If any witness fails to appear in response to a summons or refuses to testify concerning any matter on which he may lawfully be interrogated, any District Judge, on application of the commission, may compel obedience by proceedings for contempt as

in the case of disobedience of a subpoena issued from the District Court. The accused employee shall have the right to have subpoenaed any witnesses he or she may desire, upon furnishing their names to the clerk. As many as ten (10) subpoenas may be served on the request of the accused employee without charge but each additional subpoena requested by him shall be issued by the clerk and served by the police department only upon payment of fifty cents ($0.50) to the city clerk by the employee. The action and decision of the civil service commission on the charges shall be reduced to writing and kept in a book for that purpose and the written charge shall be attached to the book containing the body's decision. (5) In cases where the head of the department or the appointing authority has probable cause to believe an employee has been guilty of conduct justifying his removal or punishment he shall immediately suspend that employee from duty or from both pay and duty pending trial and the employee

shall not be placed on duty or allowed pay thereafter until the charges are heard by the civil service commission. (6) The civil service commission shall punish any employee found guilty by reprimand or a suspension for any length of time not to exceed six (6) months, or by reducing the grade, if the employee's classification warrants, or by combining any two (2) or more of these punishments, or by dismissal. No employee shall be reprimanded, removed, suspended, or dismissed except as provided in this section. (7) (a) Any of the following offices, positions, and places of employment, in the police and fire departments of a city of the second or third class, may be excluded from the classified service: 1. Chief of police; 2. Assistant chief of police; 3. Chief of firefighters; and 4. Assistant chief of firefighters. (b) Any classified employee in either department who shall accept an appointment and qualify as chief of police, assistant chief of police, chief of firefighters, or assistant chief

of firefighters shall be deemed to have received a leave of absence from the classified service for, and during the incumbency of, any of those respective positions. If an individual should cease to serve in any of those positions, there shall be restored to him or her the same classification and rank which he or she held prior to his or her appointment.

STATEMENT OF THE CASE

The Petitioner moved to Kentucky from California to accept a recommended appointment as Director of Finance and Administration for the Respondent City of Owensboro on January 2, 1997 which became effective on Feb 1, 1997. Respondent, City of Owensboro, is a city of the Second Class which operates under the City Manager form of Government under KRS 83A.150. The City of Owensboro has adopted the provisions of KRS 90.310 to KRS 90.420, which establish the requirements for a civil service

employment structure. Respondent Mayor is a member of the Board of Commissioners. The Board of Commissioners, (hereinafter Board), is the appointing authority. City Manager Ron Payne, who is not a party to this action nor a member of the appointing authority was Petitioner's direct supervisor and an agent of the City of Owensboro.

During the twelve (12) month probationary period prescribed by KRS 90.350(9), commencing on February 1, 1997, Petitioner received only one review of his performance. That review was completed by his immediate superior, the City Manager, Ron Payne. That employee evaluation, showed that City Manager Payne thought Petitioner was doing a good job. Petitioner's work performance was satisfactory during his twelve (12) month probationary period commencing February 1, 1997.

Petitioner's twelve (12) month probationary period ended on February 1, 1998 without any

indication whatsoever either orally or in writing from Respondent Board, the appointing authority, as to whether he was to be retained as a permanent member of the classified service or discharged.

On February 11, 1998, ten days after the expiration of the twelve (12) month probationary period, the Petitioner was made aware that Alma Randolph, an African-American employee in his department, had complained to the City Manager about Petitioner's failure to confirm certain hearsay information which she had received that another employee had made derogatory remarks about her. Petitioner asked that a conciliation facilitator be chosen to investigate the situation. The whole incident was dropped in March, 1998 after the conciliator reported that Ms. Randolph did not wish to file a formal complaint.

It is undisputed that the Respondent Board, by ordinance, met the first and third Tuesdays of each

month unless there was a special session called. On April 7, 1998, over two months after the expiration of his twelve (12) month probationary period, City Manager Ron Payne, Petitioner's immediate supervisor, recommended to Respondent Board, the Appointing Authority, that Petitioner receive regular appointment to a permanent civil service position. At the April 7th meeting a closed session was held in which Petitioner was present, without an attorney, to discuss the Randolph complaint. After the closed session there was a motion made by a Board member and carried by the Board of Commissioners to table Ron Payne's motion to approve Petitioner's permanent civil service appointment.

On April 20, 1998 there was another special closed session in which the Randolph incident was again discussed. No decision was made regarding Petitioner's permanent appointment at this meeting. Subsequent to the April 20th meeting City Manager

Payne repeatedly asked Petitioner for his resignation. When Petitioner refused, a special meeting of Respondent Board was called for April 22, 1998. Prior to that meeting Mr. Payne furnished Petitioner with a copy of a job performance evaluation showing a satisfactory performance rating. He advised Petitioner that this was the evaluation he had planned to give Petitioner. However, he further advised Petitioner that the evaluation didn't matter any longer because he had polled Respondent, Board of Commissioners, and knew there were sufficient votes to discharge Petitioner.

On April 22 there was, in fact, a meeting of the Board. Ralph Wible, an attorney representing Petitioner, after a motion for Petitioner's appointment to permanent civil service employment had been made, advised Respondent, Board of Commissioners, that Petitioner would be willing to agree to an extension of his probationary period so that he could further prove

himself satisfactory. Petitioner had never previously agreed to an extension of his probation. There were concerns expressed by various Respondents that an extension of probation would not be lawful. The Board voted to extend Petitioner's probationary period to October 6, 1998.

On May 28, 1998, almost four months following the conclusion of his twelve (12) month statutory probationary period, Petitioner received the results of a supervisory assessment survey. Petitioner received a "C" rating, i.e. a score of "3.03" on a 1 to 5 scale.

On September 10, 1998 Petitioner was made aware of another job performance evaluation which scored him low in the areas of work environment and relationships with subordinates. This evaluation was furnished to the Board for its review prior to Petitioner's discharge. This evaluation's responses were false and misleading. The evaluation referenced

attached anonymous comments supposedly made in support of the low ratings.

Evaluations of this type were to be completed by Petitioner's direct subordinates. Petitioner had only four direct subordinates. Petitioner learned through Judith Woods, one of his subordinates, that a comment contained in the September evaluation had actually been made by her in the May survey. Additionally, the September evaluation results show that there were six persons who responded to the survey instead of four. Finally, Petitioner learned that one of his four subordinates, Rhonda Tipton, was not interviewed for the September evaluation.

The September job performance review results were furnished to Petitioner just before his final discharge. He had no opportunity to respond to that review. No positive remarks were attached to the survey.

Petitioner was placed on administrative leave on September 10, 1998 and was finally discharged by Respondent Board of Commissioners on September 17, 1998 without reason or an opportunity for a hearing.

On December 28, 1998 Petitioner filed his Memorandum in support of his motion for summary judgment at argument two of that memorandum Petitioner made the following contention:

> Defendants' decision to discharge Plaintiff on September 17, 1998 was arbitrary as a matter of law in violation of the Fourteenth Amendment of the United States Constitution and Section Two of the Kentucky Constitution.

In Petitioner's brief submitted to the Kentucky Court of Appeals on August 2, 1999 at argument two Petitioner presented the following contention:

> The trial court committed reversible error when it failed to grant Appellant's motion for summary judgment where Appellee's decision to dismiss Appellant was arbitrary as a matter

of law in violation of Section Two of the Kentucky Constitution and the Fourteenth Amendment of the United States Constitution.

Neither the Daviess Circuit Court nor the Kentucky Court of Appeals ruled directly on these arguments.

REASONS FOR REVIEW

This court should reexamine its prior decisions holding that employees of a municipality, while serving a probationary period, do not have a property interest that is protected by the due process clause of the 14th amendment. In Gilbert v Homar, 520 U.S. 924, (1997) this court held that to have a property interest an individual must have more than a unilateral hope in continued employment. See also Connecticut Board of Pardons v Dumschat, 452 U.S. 458 at 465 (1981). Regents of the University of Michigan v Ewing, 474 U.S. 214, (1985), held that no property

interest existed where a student sought to retake a test to enter medical school even though others had been permitted to do so. Finally, in Board of Regents v Roth, 408 U.S. 564, (1972) this court held that an untenured teacher had no property interest in continued employment because he was a probationary employee

It is unrealistic to say that a person hired and serving a pre-merit protection probationary period does not have a reasonable expectation of continued employment. In today's world it is possible through the human resources department of any major city or even a small city to completely research the background of any pre-hire interviewee. It is practicable to find out if a person has any criminal background and check out the variety of facts produced in an application for employment.

The city or government, in general, certainly has a legitimate interest in hiring good employees, but government can and should protect its interest through

pre-employment interviews and background checks and, if necessary, by dismissals for cause and after an opportunity for a hearing. It is time for this court to impress upon the government that it can not act arbitrarily toward employees who have often had to move some distance to take a new job, and change many aspects of their lives in order to meet the needs of a new employment. If there is a need to dismiss an employee, that can be accommodated by writing personnel rules that spell out the causes for dismissal. Law, as has often been stated, should not be made and enforced by the whim of one or more men but carried out according to the will of the people as expressed in written guidelines that can be reviewed objectively by others.

Petitioner asks this court to re-examine its cases for the purpose of according employees the protections of due process just as this court has accorded other classes of persons traditionally not viewed as having

protected property or liberty interests with the protections of the due process clause of the Fourteenth Amendment.

For example, this court has changed and solidified the rights of persons convicted of crimes by guaranteeing them the right to probation revocation hearings even though probation was considered a privilege and not a "right", Gagnon v Scarpelli, 411 U.S. 778 (1973). The right v. privilege rationale has also been abandoned in parole violation cases. A parolee must now receive a due process hearing prior to the revocation of his parole. Morrissey v Brewer. 408 U.S. 471 (1972).

This court has also shown its inclination, in recent years, to hold governmental entities more accountable for their actions. To that end this court has expanded the rights of a person seeking redress for civil rights violations by a city. Cities are no longer immune from a civil rights action under 42 U.S.C.

1983. Owen vs. City of Independence, 445 U.S. 662 (1980).

In this case the Petitioner moved from California to Owensboro, Kentucky where he bought a home to take a job as city finance director. The Kentucky statute KRS 90.350(9) states that a civil service probationary period can be no longer than 12 months, but in the particular facts of this case the city, and the Kentucky courts reviewing the decision of the Board of Commissioners of the city of Owensboro have held that Petitioner was still on probation approximately 20 months after being hired, and thus could be dismissed without an opportunity for a due process hearing. If there was real cause to dismiss the Petitioner the city could have used and should have been required to proceed against Petitioner under KRS 90.360 which spells out the causes for dismissal of a merit employee. Instead, the petitioner was subject to

the whims of a few men without any recourse because of his "probationary status".

It should be no less important to protect the right of all government employees to be free from arbitrary action resulting in their dismissal than it is to protect employees from sexual harassment, discrimination based on race, ethnic origin or disability. A meaningful civil service is truly in jeopardy if a governmental agency or city employer can say he dismissed such a person because he or she was on a probationary status where that governmental employer exercises sole discretion in determining when a probationary period ends notwithstanding language of a governing statute to the contrary.

Those lawyers who handle indigent defense work are frequently told: "the purpose of the law is to protect and poor and the weak from the rich and the strong." It is often said by the layman that you can't fight "city hall". All that the Petitioner requests is that,

after a successful pre-hire interview and background check, and after a favorable review during his probationary period by his supervisor, he, by law, should have the opportunity to review the reasons for such dismissal and an opportunity to be heard where he had been retained in his employment beyond the statutorily prescribed twelve month probationary period.

The issues raised by this case were issues of first impression regarding the constitutional implications and protections due city employees under KRS 90.350(9). Petitioner finds it extremely disappointing that both the trial court and Kentucky's appellate courts shirked their responsibilities to take a meaningful look at the negative implications on Petitioner's constitutional rights to protect his property interest in continued employment and to receive due process of law. The Daviess Circuit court adopted, word for word, the findings of fact and conclusions of

law submitted by Respondents in support of their opposition to Petitioner's motion for summary judgment. The Kentucky Court of Appeals reprinted that order verbatim as its unpublished opinion in this case.

Petitioner now seeks in this, the court of last resort, to have an opportunity to brief all the relevant law and facts surrounding this case and receive an objectively determined decision.

CONCLUSION

Petitioner respectfully requests that this petition for writ of certiorari be granted.

RESPECTFULLY SUBMITTED

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RENDERED: AUGUST 25, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000727-MR

LARRY SABO — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE GARLAND W. HOWARD, JUDGE
ACTION NO. 98-CI-01230

CITY OF OWENSBORO; BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO; AND, WAYMOND MORRIS, DICK MOORE, OLIVE BURROUGHS, BILL VAN WINKLE, and JIM WOODS, each in his or her capacity as a member of the Board of Commissioners of the City of Owensboro — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY AND TACKETT, JUDGES.

McANULTY, JUDGE: In this appeal, Larry Sabo appeals the order of the Daviess Circuit Court which determined that under KRS 90.350(9), he did not acquire permanent employment status at the close of the probationary period of his employment as the

Director of Finance and Administration for the City of Owensboro. Sabo alleged that the statute required the appointing authority to make its employment decision immediately before or immediately after the close of the twelve month probation and failure to do so effectively vested him with permanent employment status. The trial court disagreed, and granted summary judgment for the City of Owensboro and the Board of Commissioners of the City of Owensboro.

On appeal, we are not persuaded by Sabo's arguments that the opinion of the Daviess Circuit Court was incorrect. Because we find that the reasoning and analysis of that opinion are fully explanatory of the proper construction of the statute at issue, we adopt the "Discussion" portion of the opinion below as our opinion in this appeal:

> The dispositive issue of law involves Plaintiff's [Appellant Larry Sabo's] employment status at the time of his release in September, 1998. Specifically, whether Plaintiff was an at-will employee as a probationary appointee, or a regular civil service employee. Thus, this matter turns on the statutory construction of KRS 90.350(9). This statute provides:
>
> > The appointing authority may provide that all appointments for initial permanent employment may be probationary appointments for a period of not more than twelve (12) months, *after which* probationary period regular appointments shall be given to all

probationary employees *who are deemed to be satisfactory by the respective appointing authority*. (emphasis added.)

Plaintiff contends that, since the statute provides for a "probationary appointment for a period of not more than twelve (12) months," he automatically attained regular civil service status following his first twelve (12) months of probationary employment. Defendants [Appellees, the City of Owensboro and the Board of Commissioners of the City of Owensboro], on the other hand, contend that an affirmative determination by the Board, as the appointing authority, that the employee is "deemed to be satisfactory" is required before any employee can obtain regular civil service status. The Court finds that affirmative action by the Board was required to accord Plaintiff regular civil service status.

In interpreting the provisions of any statute, the court must first look at the "plain language of the statute [interpreted] in its ordinary sense, unless such a straightforward interpretation will lead to illogical or ludicrous results." Wells v. Baker, Ky. App., 713 S.W.2d 476, 478 (1986). The plain language of the statute requires an affirmative determination by the appointing authority that the employee is "deemed to be satisfactory" before any employee attains regular civil service status. This construction is consistent with the legislative intent. See Thurman v. Commonwealth of Kentucky, Cabinet for Human Resources, Ky. App., 828 S.W.2d 368, 370 (1992)(The Court's function in construing a statute is to interpret the language so as to give effect to the intent of the legislature.).

It was clearly the intent of the legislature to have the appointing authority make an affirmative determination that the employee is satisfactory before regular civil service status is conferred on a municipal employee. Otherwise, the legislature would have included the language contained in KRS 18A.111(1), the parallel probationary period statute for state merit employees. This statute provides:

> Unless the appointing authority notifies the employee prior to the end of the initial probationary period that he is separated, the employee shall be deemed to have served satisfactorily and shall acquire status in the classified service.

The legislature's recognition of these distinct means of appointment is apparent from the statutory predecessor to KRS 18A.111(1). Subsection [8] of 18.210 originally provided for affirmative action by the appointing authority for the appointment of state merit employees to regular status, but the statute was amended by Chapter 86, Section 5, of the 1976 Acts, as follows:

> (8) For a period of probation not to exceed one (1) year before appointment or promotion may be [made] complete, and during which period a probationer may be discharged or reduced in class or rank, or replaced on the eligible list. *Unless the appointing authority notifies the employe prior to the end of the probationary period that the employe's services are not satisfactory, the employe shall have status in the classified service. The notice shall be in writing and as provided by*

personnel rules; ~~The appointing authority shall within thirty (30) days prior to the expiration of an employe's probationary period, notify the commissioner in writing whether the probationary employe is recommended for permanent status. Only if the appointing authority certifies to the satisfactory nature of the probationary employe's services, shall permanent status be conferred;~~

The statutory language of KRS 18A.111(1) now explicitly permits a state merit employee to be "deemed to have served satisfactory" [sic] without an affirmative determination by the appointing authority. If the legislature had intended for a city probationary civil service employee to acquire regular civil service status without an affirmative action of the appointing authority, the legislature would have included similar language in KRS 90.350(9). This statutory construction is consistent with the maxim of *expressio unius est exclusio alterius*, meaning that the expression of one thing is the exclusion of another. See Bloemer v. Turner, 281 Ky. 832, 137 S.W.2d 387 (1939); Allen v. Hollingsworth, 246 Ky. 812, 56 S.W.2d 530 (1933).

This construction of KRS 90.350(9) is further supported by the recent Supreme Court decision in The Evangelical Lutheran Good Samaritan Society, Inc. v. Albert Oil Co., Ky., 969 S.W.2d 691 (1998). In The Evangelical Lutheran, the issue was whether "the 90 day period set out in KRS 100.211(7) during which a local [legislative] body or fiscal court must take final action on a planning and zoning recommendation regarding a proposed zoning [map] amendment" was mandatory. Id. at 692. Since the statute specifically provided for a 90 day time

period in which the fiscal court or legislative body had to take action, or otherwise "be deemed to have passed by operation of law," the Court held that "the legislative directive is clearly evident in the statute, that is, specific consequences related to inaction by the board are statutorily provided." Id. at 693.

The Court in The Evangelical Lutheran contrasted its earlier decision in Ratliff v. Phillips, Ky., 746 S.W.2d 405 (1988), where it held that failure of a Board of Adjustment to render a decision within the time prescribed by statute did not "automatically divest it of jurisdiction." Id. at 406. The Court in Ratliff refused "to imply language which the statute does not contain," Id., and instead held that the remedy for failure to act is a writ of mandamus after the expiration of the time allowed. The Court in The Evangelical Lutheran pointed out that "[t]he Ratliff decision turned on the absence of any statutory language establishing the consequences of the failure to act by the Board." The Evangelical Lutheran, supra, at 693.

Unlike the statute at issue in The Evangelical Lutheran, KRS 90.350(9) does not provide for a specific time period in which the appointing authority must act after the twelve (12) month probationary period and, more important, the statute does not specifically state the consequences related to "inaction" by the appointing authority. Again, if the legislature had intended "automatic" regular civil service status as a consequence for failure to act by the Board, the legislature would have included language similar to that contained in KRS 18A.111(1).

The Plaintiff argues that the failure of the Board to act on his

appointment "immediately before or immediately after" the expiration of his twelve month probationary period permits the Board to render the legislature's directive that a probationary period not exceed twelve months a nullity, and permits an appointing authority to arbitrarily prevent an employee from attaining regular status. While there may be circumstances where a delay in acting on an appointment reflects an attempt to thwart the statute's dictates as to length of probation, the facts, as claimed by Plaintiff, certainly show otherwise. Furthermore, the Court in Ratliff v. Phillips, Ky., 746 S.W.2d 405 (1988), held that a writ of prohibition[1] would lie to require a public body to act if it failed to do so within the time prescribed by statute.

The Plaintiff acknowledges that he himself wanted to clear his name regarding the "discrimination" issue which was alleged to have occurred during his twelve month probationary period. The City hired an "investigator/conciliator" to explore the claim. This process was not completed until some time in March. At the Board's first meeting in April it considered Plaintiff's appointment. Discussions between the Board and Plaintiff continued on April 20. Then when his appointment was up for consideration on April 22, it was the Plaintiff, through his counsel, who asked the Board to extend his probationary period another six months.

It is the Plaintiff who sought to delay action on his appointment, first by seeking to "clear his name" and then by requesting time to allow himself to reverse what he perceived as his impending release by

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[1] Although the Daviess Circuit Court states here that a "writ of prohibition would lie," the court properly should have stated that a writ of *mandamus* could be had to require the public body to act, as that is what Ratliff directs.

the Board. It is disingenuous for the Plaintiff now to argue that delay by the Board on the appointment ripened into automatic status and that the clear directive of the statute that the appointing authority must deem an employee satisfactory was intended by the legislature not to apply if the appointing authority defers action on an appointment.

The Plaintiff also places great reliance on the city manager's initial recommendation of Plaintiff for regular status and what Plaintiff claims is substantial evidence that he did perform satisfactorily. Although these facts may be in dispute, they are not relevant to a determination of the legal issue to be resolved. First, under KRS 90.350(9), it is the Board, not the city manager, who is charged with determining if the Plaintiff was satisfactory. Second, if the Plaintiff was an at-will probationary employee, he could be dismissed in the unfettered discretion of the Board. Louisville Professional Fire Fighters Association v. City of Louisville, Ky., 508 S.W.2d 42, 43 (1974). Therefore, it is not for this Court to evaluate the Plaintiff's performance, but only to decide if he attained regular civil service status. Furthermore, if he had attained regular status, his discharge would be governed by KRS 90.360 and the matter would be heard by the civil service commission, not this Court.

Accordingly, the Court finds that the plain language of the statute and the legislative intent supports that conclusion that an affirmative determination by the appointing authority that the employee is deemed to be satisfactory is required before an employee can obtain regular civil service status. Thus, the Court finds that the Plaintiff was an at-will employee at the time the Board released Plaintiff on September 17,

1998. As a probationary employee, the Board, as employer, has "unfettered discretion in deciding whether to retain a probationary employee."

Having found Plaintiff to be an at-will employee at the time of his release, Plaintiff did not have a constitutionally protected interest in this position. See Hooks v. Smith, Ky. App., 781 S.W.2d 522, 523 (1989). Thus, both Plaintiff's wrongful discharge and constitutional claims must fail as a matter of law.

We affirm.

ALL CONCUR.

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BRIEF FOR APPELLEES:

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Kamuf, Yewell, & Pace
Owensboro, Kentucky

Commonwealth Of Kentucky

Court Of Appeals

1999-CA-000727-MR

LARRY SABO — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
ACTION NO. 98-CI-001230

CITY OF OWENSBORO, ET AL — APPELLEES

ORDER DENYING PETITION FOR REHEARING

* *

BEFORE: BUCKINGHAM, MCANULTY, and TACKETT, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: OCT 19 2000

David C. Buckingham

JUDGE, COURT OF APPEALS

Supreme Court of Kentucky

2000-SC-1016-D
(1999-CA-0727)

LARRY SABO — MOVANT

V.

DAVIESS CIRCUIT COURT
NO. 1998-CI-1230

CITY OF OWENSBORO, KENTUCKY, ET AL. — RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED August 15, 2001.

Chief Justice

COMMONWEALTH OF KENTUCKY
DAVIESS CIRCUIT COURT
DIVISION I
CASE NO. 98-CI-01230

LARRY SABO — PLAINTIFF

v.

CITY OF OWENSBORO, et. al. — DEFENDANTS

****

OPINION AND SUMMARY JUDGMENT

This matter is before the Court on the Motions of both the Plaintiff and the Defendants for Summary Judgment. The parties having fully briefed the issues and having heard the arguments of the parties, this matter is ripe for consideration by the Court. For the reasons set forth below, the Motion of the Defendants is granted and Plaintiff's Motion is denied.

FACTS

Plaintiff alleges that the Owensboro Board of Commissioners (the Board) wrongfully terminated him in violation of KRS 90.310 *et. seq.*, when it released him from his probationary appointment as Director of Finance and Administration on September 17, 1998. (See Complaint at ¶ 6 through 8). Plaintiff alleges that, pursuant to KRS 90.350(9), he obtained status as a regular, full-time civil service employee by serving in excess of the twelve (12) months in the position of Director of Finance and Administration. (See Complaint at ¶¶ 9 and 11). In light of Plaintiff's allegations, both parties agree that Plaintiff's claim turns on a

pure question of law involving the statutory construction of KRS 90.350(9). Accordingly, the factual circumstances of Plaintiff's employment are not material to the disposition of the case. Nevertheless, the Court will assume for purposes of the motions for summary judgment that the following facts are undisputed by the parties.

On February 1, 1997, Plaintiff was given probationary appointment as Director of Finance and Administration for the City of Owensboro. In December, 1997, prior to the twelfth month anniversary of Plaintiff's probationary appointment, Plaintiff was involved in a complaint regarding allegations of discrimination by a co-worker. Accordingly, the city manager told Plaintiff on December 16, 1997 that he was considering extending Plaintiff's probation beyond February 1, 1998. With the Plaintiff's concurrence, an outside investigator/conciliator was hired by the City during February , 1998. Again, in an effort to resolve the matter prior to having the Board, as the appointing authority pursuant to KRS 90.350(9) , make its final determination with respect to Plaintiff's employment status, the city manager advised Plaintiff on February 13, 1998 that he was going to extend Plaintiff's probationary appointment until the discrimination matter was resolved. The fact-finding investigation of the grievance was not completed until some time in March, 1998.

Once the investigation was concluded the city manager placed the regular appointment of the Plaintiff on the Board's agenda and the Board, as the appointing authority, had its first opportunity to address Plaintiff's appointment to regular, full-time civil service status on April 7, 1998. After meeting with the Plaintiff in closed session on April 7, the Board deferred action to permit further discussion of whether Plaintiff was satisfactory for appointment. The Board met again with Plaintiff in closed session on April 20, 1998. During

the Board's meeting of April 22, 1998, Plaintiff, through his former attorney, proposed to the Board that rather than voting on his appointment at that time, he would be willing to agree to an extension of his probationary period until October 7, 1998 in order to prove himself satisfactory to the Board. Plaintiff's proposal was accepted by the Board and was memorialized in the written "Agreement" of May 11, 1998, that has been entered into the record which provided that his probationary period would be extended for a period ending no later than October 7, 1998.

On September 17, 1998, the Board, as the appointing authority, considered the appointment of the Plaintiff to regular civil service status and voted to release him from his probationary employment. Plaintiff now claims that he attained regular civil service status in February, 1998.

DISCUSSION

The dispositive issue of law involves Plaintiff's employment status at the time of his release in September, 1998. Specifically, whether Plaintiff was an at-will employee as a probationary appointee, or a regular civil service employee. Thus, this matter turns on the statutory construction of KRS 90.350(9). This statute provides:

> The appointing authority may provide that all appointments for initial permanent employment may be probationary appointments for a period of not more than twelve (12) months, ***after which*** probationary period regular appointments shall be given to all probationary employees ***who are deemed to be satisfactory by the respective appointing authority.*** (emphasis added.)

Plaintiff contends that, since the statute provides for a "probationary appointment for a period of not more than twelve (12) months," he automatically attained regular civil service

status following his first twelve (12) months of probationary employment. Defendants, on the other hand, contend that an affirmative determination by the Board, as the appointing authority, that the employee is "deemed to be satisfactory" is required before any employee can obtain regular civil service status. The Court finds that affirmative action by the Board was required to accord the Plaintiff regular civil service status.

In interpreting the provisions of any statute, the Court must first look at the "plain language of the statute in its ordinary sense, unless such a straight forward interpretation will lead to illogical or ludicrous results." *Wells v. Baker*, Ky. App., 713 S.W.2d 476, 478 (1986). The plain language of the statute requires an affirmative determination by the appointing authority that the employee is "deemed to be satisfactory" before any employee attains regular civil service status. This construction is consistent with the legislative intent. *See Thurman v. Commonwealth of Kentucky, Cabinet for Human Resources*, Ky. App., 828 S.W.2d 368, 370 (1992) (The Court's function in construing a statute is to interpret the language so as to give effect to the intent of legislature.).

It was clearly the intent of the legislature to have the appointing authority make an affirmative determination that the employee is satisfactory before regular civil service status is conferred on a municipal employee. Otherwise, the legislature would have included the language contained in KRS 18A.111(1), the parallel probationary period statute for state merit employees. This statute provides:

> Unless the appointing authority notifies the employee prior to the end of the initial probationary period that he is separated, the employee shall be deemed to have served satisfactorily and shall acquire status in the classified service period.

The legislature's recognition of these distinct means of appointment is apparent from the statutory predecessor to KRS 18A.111(1). Subsection (9) of 18.210 originally provided for affirmative action by the appointing authority for the appointment of state merit employees to regular status, but the statute was amended by Chapter 86, Section 5, of the 1976 Acts, as follows:

> (8) For a period of probation not to exceed one (1) year before appointment or promotion may be complete, and during which period a probationer may be discharged or reduced in class or rank, or replaced on the eligible list. *Unless the appointing authority notifies the employe prior to the end of the probationary period that the employe's services are not satisfactory, the employe shall have status in the classified service. The notice shall be in writing and as provided by personnel rules;* ~~The appointing authority shall, within thirty (30) days prior to the expiration of an employe's probationary period, notify the commissioner in writing whether the probationary employe is recommended for permanent status. Only if the appointing authority certifies to the satisfactory nature of the probationary employe's services, shall permanent status be conferred;~~

The statutory language of KRS 18A.111(1) now explicitly permits a state merit employee to be "deemed to have served satisfactory" without an affirmative determination by the appointing authority. If the legislature had intended for a city probationary civil service employee to acquire regular civil service status without an affirmative action of the appointing authority, the legislature would have included similar language in KRS 90.350(9). This statutory construction is consistent with the maxim of *expressio unius est exclusio alterius*, meaning that the expression of one thing is the exclusion of another. *See Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d 387 (1939); *Allen v. Hollingsworth*, 246 Ky. 812, 56 S.W.2d 530 (1933).

This construction of KRS 90.350(9) is further supported by the recent Supreme Court decision in *The Evangelical Lutheran Good Samaritan Society, Inc. v. Albert Oil Co.*, Ky., 969 S.W.2d 691 (1998). In *The Evangelical Lutheran*, the issue was whether "the 90 day period

set out in KRS 100.211(7) during which a local body or fiscal court must take final action on a planning and zoning recommendation regarding a proposed zoning amendment" was mandatory. *Id.* at 692. Since the statute specifically provided for a 90 day time period in which the fiscal court or legislative body had to take action, or otherwise "be deemed to have passed by operation of law," the Court held that "the legislative directive is clearly evident in the statute, that is, specific consequences related to inaction by the board are statutorily provided." *Id.* at 693.

The Court in *The Evangelical Lutheran* contrasted its earlier decision in *Ratliff v. Phillips*, Ky., 746 S.W.2d 405 (1988), where it held that failure of a Board of Adjustment to render a decision within the time prescribed by statute did not "automatically divest it of jurisdiction". *Id.* at 406. The Court in *Ratliff* refused "to imply language which the statute does not contain," *Id.*, and instead held that the remedy for failure to act is a writ of mandamus after the expiration of the time allowed. The Court in *The Evangelical Lutheran* pointed out that "(t)he *Ratliff* decision turned on the absence of any statutory language establishing the consequences of the failure to act by the Board." *The Evangelical Lutheran*, supra, at 693.

Unlike the statute at issue in *The Evangelical Lutheran*, KRS 90.350(9) does not provide for a specific time period in which the appointing authority must act after the twelve (12) month probationary period and, more important, the statute does not specifically state the consequences related to "inaction" by the appointing authority. Again, if the legislature had intended "automatic" regular civil service status as a consequence for failure to act by the Board, the legislature would have included language similar to that contained in KRS 18A.111(1).

The Plaintiff argues that the failure of the Board to act on his appointment "immediately before or immediately after" the expiration of his twelve month probationary period permits the Board to render the legislature's directive that a probationary period not exceed twelve months a nullity, and permits an appointing authority to arbitrarily prevent an employee from attaining regular status. While there may be circumstances where a delay in acting on an appointment reflects an attempt to thwart the statute's dictates as to length of probation, the facts, as claimed by the Plaintiff, certainly show otherwise. Furthermore, the Court in *Ratliff v. Phillips*, Ky., 746 S.W.2d 405 (1988), held that a writ of prohibition would lie to require a public body to act if it failed to do so within the time prescribed by statute.

The Plaintiff acknowledges that he himself wanted to clear his name regarding the "discrimination" issue which was alleged to have occurred during his twelve month probationary period. The City hired an "investigator/conciliator" to explore the claim. This process was not completed until some time in March. At the Board's first meeting in April it considered the Plaintiff's appointment. Discussions between the Board and the Plaintiff continued on April 20. Then when his appointment was up for consideration on April 22, it was the Plaintiff, through his counsel, who asked the Board to extend his probationary period another six months.

It is the Plaintiff who sought to delay action on his appointment, first by seeking to "clear his name" and then by requesting time to allow himself to reverse what he perceived as his impending release by the Board. It is disingenuous for the Plaintiff now to argue that delay by the Board on the appointment ripened into automatic status and that the clear directive

of the statute that the appointing authority must deem an employee satisfactory was intended by the legislature not to apply if the appointing authority defers action on an appointment.

The Plaintiff also places great reliance on the city manager's initial recommendation of the Plaintiff for regular status and what the Plaintiff claims is substantial evidence that he did perform satisfactorily. Although these facts may be in dispute, they are not relevant to a determination of the legal issue to be resolved. First, under KRS 90.350(9), it is the Board, not the city manager, who is charged with determining if the Plaintiff was satisfactory. Second, if the Plaintiff was an at-will probationary employee, he could be dismissed in the unfettered discretion of the Board. *Louisville Professional Fire Fighters Association v. City of Louisville*, Ky., 508 S.W.2d 42, 43 (1974). Therefore, it is not for this Court to evaluate the Plaintiff's performance, but only to decide if he attained regular civil service status. Furthermore, if he had attained regular status, his discharge would be governed by KRS 90.360 and the matter would be heard by the civil service commission, not this Court.

Accordingly, the Court finds that the plain language of the statute and the legislative intent supports the conclusion that an affirmative determination by the appointing authority that the employee is deemed to be satisfactory is required before an employee can obtain regular civil service status. Thus, the Court finds that the Plaintiff was an at-will employee at the time the Board released Plaintiff on September 17, 1998. As a probationary employee, the Board, as employer, has "unfettered discretion in deciding whether to retain a probationary employee."

Having found Plaintiff to be an at-will employee at the time of his release, Plaintiff did not have a constitutionally protected interest in this position. *See Hooks v. Smith*,

Ky. App., 781 S.W.2d 522, 523 (1989). Thus, both Plaintiff's wrongful discharge and constitutional claims must fail as a matter of law.

For the reasons stated above, there is no genuine issue of material fact and the Defendants are entitled to judgment as a matter of law pursuant to CR 56. Therefore, Plaintiff's motion for summary judgment is denied and summary judgment is granted to the Defendants.

This 5th day of March, 1999.

Garland W Howard

GARLAND W. HOWARD, Judge
Daviess Circuit Court, Div. I

COPIES MAILED TO:

Hon. Dave Whalin
Hon. Sun S. Choy
Hon. David Fowler
Hon. Patrick D. Pace
Hon. David Murrell

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PAT HARDESTY, CLERK
DAVIESS CIRCUIT COURT
BY K Wm Satt D.C.

Supreme Court, U.S.
FILED
MAY 1 2002

No. 01-1439

IN THE
Supreme Court of the United States

LARRY SABO,

Petitioner,

v.

CITY OF OWENSBORO, KENTUCKY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF OWENSBORO, *et al.*

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QUESTION PRESENTED

Whether the trial court properly granted, and the Kentucky Court of Appeals properly affirmed, the finding of the Daviess Circuit Court that Petitioner had no property interest in continued employment as a probationary employee which was protected under the Fourteenth Amendment of the United States Constitution.

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STATUTORY PROVISIONS INVOLVED

KRS 18A.111(1) Probationary periods for classified service — Initial and promotional.

> (1) Except when appointed to a job classification with an initial probationary period in excess of six (6) months, and except as provided in KRS 18A.005, an employee shall serve a six (6) months probationary period when he is initially appointed to the classified service. An employee may be separated from his position, reduced in class or rank, or replaced on the eligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095. If the employee is separated from his position, he shall be notified in writing at least ten (10) working days prior to separation. A copy of the notification shall be forwarded to the commissioner. The employee shall be placed on an eligible list but shall not be certified to the agency from which he was separated unless that agency so requests. Unless the appointing authority notifies the employee prior to the end of the initial probationary period that he is separated, the employee shall be deemed to have served satisfactorily and shall acquire status in the classified service.

KRS 90.350(9)

> (9) The appointing authority may provide that all appointments for initial permanent employment may be probationary appointments for period of

> not more than twelve (12) months, after which probationary period regular appointments shall be given to all probationary employees who are deemed to be satisfactory by the respective appointing authority.

COUNTERSTATEMENT OF THE CASE

Respondents do not accept "Petitioner's Statement of Facts." In the Complaint, Petitioner alleged that the Owensboro Board of Commissioners (the Board) wrongfully terminated him in violation of KRS 90.310, *et seq.*, when it released him from his probationary appointment as Director of Finance and Administration on September 17, 1998. In particular, Petitioner alleged that, pursuant to KRS 90.350(9), he attained status as a regular, full-time civil service employee simply by serving in excess of twelve (12) months in the position of Director of Finance and Administration. Petitioner maintained that since he was a regular, full-time civil service employee at the time of his release, that his

> rights to substantive and procedural due process as guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution and KRS 90.360 were violated when Petitioner was discharged without notice of the charges against him and without an opportunity for a due process hearing and other rights guaranteed to him under KRS 90.360.

In light of Petitioner's allegations, the sole dispositive issue before the Trial Court and the Kentucky Court of Appeals was purely a question of law: Under the plain

language of KRS 90.350(9), was the Petitioner a probationary at-will employee unless and until he was "deemed satisfactory" by the Board, or did the Petitioner obtain status as a regular civil service employee simply by the passage of time?

Both the Petitioner and the Respondents moved for summary judgment. The Trial Court agreed with the parties that the dispositive issue of law involved Petitioner's employment status at the time of his release on September 17, 1998. The Trial Court found that the plain language of KRS 90.350(9), and the legislative intent of the statute, supports the conclusion that an affirmative determination by the appointing authority (the Board) that the employee is "deemed to be satisfactory" is required before an employee can obtain regular civil service status. Since it is undisputed that the Board considered Petitioner's regular appointment on September 17, 1998 and voted to release him from his probationary appointment, the Board, as the appointing authority, did not deem Petitioner to be satisfactory as required by KRS 90.350(9). Finding that Petitioner was an at-will employee at the time of his release, the Trial Court and Kentucky Court of Appeals determined that the Board, as the employer, had "unfettered discretion in deciding whether to retain a discretionary employee." The Trial Court and Kentucky Court of Appeals thus concluded that Petitioner failed to state a claim for wrongful discharge and a claim for constitutional violations as a matter of law.

Petitioner, has provided this Court with "facts" that culminated in Petitioner's release. As determined by the Trial Court and the Kentucky Court of Appeals, some of the undisputed facts explain why the Board's decision to release Petitioner was delayed. While many of the "facts" alleged

by the Petitioner are disputed by the Respondents, the material facts relevant to the statutory construction of KRS 90.350(9) are not in dispute. The factual inquiry of whether Petitioner was actually doing a ***"good job"*** during the initial twelve (12) months of his probationary appointment or after the twelve (12) months has no bearing on the legal issue of his employment status at the time the Board voted to release Petitioner on September 17, 1998. Indeed, whether Petitioner was doing a good or satisfactory job is irrelevant for purposes of determining Petitioner's employment status under the statute at the time of his release.

REASONS FOR DENYING THE WRIT

The questions allegedly presented for review by the Petitioner are whether he was deprived of a property interest in continued employment in violation of the due process clause of the Fourteenth Amendment when he was terminated following the expiration of his twelve month statutory probationary period and whether Petitioner had a right to due process under the Fourteenth Amendment when he was dismissed after approximately twenty months of employment. Petitioner goes on to state in his Statement of the Case that neither the Daviess Circuit Court nor the Kentucky Court of Appeals ruled directly on such arguments and thus that a writ is appropriate. Respondents note, as acknowledged by Petitioner, that both such arguments were presented to the Daviess Circuit Court and the Kentucky Court of Appeals, each of which clearly had an opportunity to and did review all authority and arguments asserted in support of such contentions. Clearly, such Courts did not find Petitioner's contentions persuasive and/or relevant for the entry of summary judgment and subsequent affirmation on appeal. Petitioner presents no new or novel argument in his Petition

for Writ to this Court. The Daviess Circuit Court and the Kentucky Court of Appeals' rulings were proper in all respects and Respondent respectfully urges this honorable Court to deny the Petition for Writ of Certiorari.

Petitioner asserts that since he was fired following expiration of a twelve month statutory probationary period he became a regular civil service employee who could not be dismissed without cause and/or without an opportunity for a hearing. Such assertions are simply incorrect and totally ignore existing Kentucky statutory and case authority.

The provisions of KRS 90.350(9) are not inconsistent. Such statute clearly provides that one will be promoted to regular civil service status if the probationary employee is determined to be satisfactory. This is harmonious with KRS 18A.111(1) which provides that a probationary employee acquires classified civil service status, unless the appointing authority notifies the employee prior to the end of the probationary period that he is separated from employment. Such rationale is borne out by the legislative history of KRS 18A.111(1). Subsection (9) of KRS 18.210, the predecessor of that statute, originally provided for a affirmative action by the appointing authority for the appointment of state merit employees to regular status. The statute was amended by chapter 86, § 5 of the 1976 acts as follows:

> (8) For a period of probation not to exceed (1) year before appointment or promotion may be complete, and during which period a probationer may be discharged or reduced in class or rank, or placed on the ineligible list. Unless the appointing authority notifies the employee prior to the end

> of the probationary period that the employee's services are not satisfactory, the employee shall have status in the classified service. A notice shall be in writing as provided by personnel rules; ~~The appointing authority shall, within thirty (30) days prior to the expiration of an employee's probationary period, notify the commissioner in writing whether the employee is recommended for permanent status. Only if the appointing authority certifies to the satisfactory nature of the probationary employee's services, shall permanent status be conferred;~~ [NOTE: The legislature renumbered §§ (9) as §§ (8) in the 1976 Amendment.]

If the legislature had intended that a probationary civil service employee would automatically acquire regular civil service status by the failure of the appointing authority to act, the legislature would have amended KRS 90.350(9) in the same fashion. It did not. Both the Daviess Circuit Court and the Court of Appeals appropriately construed the statute in question.

The Petitioner's claims of constitutional deprivations are equally unfounded. As a probationary employee, the Petitioner was dischargeable at will. The board had "unfettered discretion in deciding whether to retain a probationary employee." *Louisville Professional Firefighters Association v. City of Louisville, Kentucky, Ky.*, 508 S.W.2d 42 (1974) at 43. Petitioner, as an at-will probationary employee, had no constitutionally protected interest in his probationary position. *Hooks v. Smith*, Ky. App., 781 S.W.2d 522 (1989). As recognized by Petitioner, this Court has reached similar conclusions. *Gilbert v. Homar*, 520 U.S. 924 (1997); *Connecticut Board of Pardons v. Durnschat*, 452 U.S. 458 at 465 (1981); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985); and *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Despite this, Petitioner asserts that this Court should review its decisions in the foregoing cases regarding one's proprietary interest in continued employment as protected by the due process clause of the Fourteenth Amendment while serving a probationary period. In support of such petition, Petitioner relies upon earlier decisions of this Court, some of which even pre-date the above-referenced authority, regarding convicted parolees' entitlements to due process prior to revocation of parole. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). Such cases are clearly distinguishable in that they involve an individual's personal freedom, clearly protected under the Fourteenth Amendment, and are in no way analogous to this case and one's expectation of continued employment while in a probationary position.

Petitioner also asserts that the Court has shown an inclination to hold governmental agencies more accountable for their actions. While this might be true, such in no way supports Petitioner's Writ for Certiorari in that it is not a question of whether Respondent is immune from a civil rights action under 42 U.S.C. § 1983, as clearly they are not, but rather whether Petitioner, as a probationary employee, had a property interest in continued employment with the City of Owensboro which was protected under the United States Constitution.

Petitioner has offered absolutely no authority in support of his Petition and to grant the same would result in a contorted interpretation of existing statutory and pertinent case law. The Petition for Writ of Certiorari is entirely without merit and should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this honorable Court deny the Petition.

Respectfully submitted,

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